Filing # 86526389 E-Filed 03/18/2019 10:43:39 AM

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

SHARRIF K. FLOYD,

Plaintiff,

v. **Case No.: 2018-CA-012128-O**

DR. JAMES ANDREWS, M.D.; DR. GREGORY HICKMAN, M.D.; DR. CHRISTOPHER WARRELL, M.D.; DR. TARIQ HENDAWI, M.D.; THE ANDREWS AMBULATORY SURGERY CENTER, LLC; PARADIGM ANESTHESIA, P.A.; BAPTIST HOSPITAL, INC.; BAPTIST HEALTH CARE CORPORATION; GULF BREEZE HOSPITAL, INC.; BAPTIST HOSPITAL, INC. d/b/a GULF BREEZE HOSPITAL And BAPTIST PHYSICIAN GROUP, LLC,

Defendants.

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DEFENDANTS GREGORY HICKMAN M.D. AND PARADIGM ANESTHESIA, P.A.'S MOTION TO DISMISS COUNTS I, III, IV AND VIII OF THE COMPLAINT

Defendants, GREGORY HICKMAN, M.D. (Hickman) and PARADIGM ANESTHESIA, P.A., (Paradigm), by and through their undersigned trial counsel, and pursuant to Rules 1.110 and 1.140(b) of the Florida Rules of Civil Procedure hereby move to dismiss Counts I, III, IV and VIII of Complaint filed by Plaintiff

for failure to state a cause of action. In support of their motion to dismiss, Defendants state as follows:

I. INTRODUCTION

The instant action arises out of the medical care and treatment of Plaintiff, Sharif Floyd, a former NFL defensive lineman who resides in Pennsylvania. Mr. Floyd underwent right knee surgery in September 2016 in Gulf Breeze, Santa Rosa County, Florida at The Andrews Institute Ambulatory Surgery Center (ASC). Plaintiff filed this suit alleging that his treating physicians committed medical negligence, bringing an early end to his professional football career.

Plaintiff's Complaint asserts eight Counts against nine Defendants. Of those eight Counts, four are vicarious liability claims involving allegations of agency and joint venture. However, Plaintiff's Complaint makes a series of wide ranging, confusing, convoluted, and disorganized allegations in an attempt to allege agency and joint venture causes of action. Specifically, as to Defendants Hickman and Paradigm, the Complaint attempts to allege vicarious liability against Hickman based on a purported actual joint venture (Counts IV and VIII), and against Paradigm, based on purported agency (Count III). However, from the face of the Complaint it is clear that all claims should be dismissed as a matter of law because they fail to allege any "ultimate facts" in support of the claims.

Moreover, the Complaint also attempts to allege a medical negligence claim against Hickman (Count I) but in so doing it incorporates the same wide ranging,

confusing, convoluted, and disorganized allegations into Count I which render it an impermissible "shotgun" pleading. Shotgun pleadings do not give the defendant (or the Court) adequate notice of the claim and the grounds upon which it is based and thus are impermissible and subject to dismissal.

Accordingly, Counts I, III, IV and VIII as currently plead are defective and insufficient as a matter of law and therefore must be dismissed.

II. LEGAL REQUIREMENT TO PLEAD "ULTIMATE FACTS"

Florida is a fact-pleading jurisdiction and it is well settled that a plaintiff must articulate ultimate facts supporting the claim. Fla. R. Civ. P. 1.110(b) (requiring "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief"); *Goldschmidt v. Holman*, 571 So.2d 422, 423 (Fla. 1990). This "ultimate fact" pleading rule "forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort." *Horowitz v. Laske*, 855 So.2d 169, 172–73 (Fla. 2003). Therefore, at the outset of a suit, litigants must articulate ultimate facts that state their pleadings "with sufficient particularity" for a defense to be prepared. *Id.*

In order to state a cause of action that is sufficient to deny a motion to dismiss for failure to state a cause of action, a complaint must comply with the rule and specifically allege sufficient ultimate facts to show that the pleader is entitled

to relief. *E.g. Perry v. Cosgrove*, 464 So. 2d 664, 665 (Fla. 2d DCA 1985); *see also, Atkins v. Topp Telecom, Inc*., 873 So. 2d 397, 399 (Fla. 4th DCA 2004); *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So. 2d 297, 300 (Fla. 4th DCA 1999)("[t]o state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief."). Whether a complaint is "sufficient to state a cause of action is an issue of law." *W.R. Townsend Contracting, Inc.,* 728 So. 2d at 300. "Ultimate Facts" have been defined as "all those facts necessary to be found in a given case in order that the determination of the right of the parties shall become a pure question of law." *Brown v. Griffen,* 229 So. 2d 225, 227 (Fla. 1969). Thus, the question for the trial court to decide is whether, assuming the well-pleaded factual allegations in the Complaint are true, a plaintiff would be entitled to the relief requested.

While "courts must liberally construe, and accept as true, factual allegations in a complaint and reasonably deductible inferences therefrom," they need not, however, accept conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party. *W.R. Townsend Contracting, Inc.,* 728 So. 2d at 300. In other words, a plaintiff is not entitled to have the court accept as true conclusory assertions or summary claims as to the applicability of the facts alleged. *See Messana v. Maule Indus.*, 50 So.2d 874, 876 (Fla. 1951). This same rule applies to vicarious liability claims such as agency and joint venture. *Goldschmidt*, 571 So.2d at 423 ("Because the complaint failed to set forth any ultimate facts that

establish either actual or apparent agency or any other basis for vicarious liability, the Holmans did not allege any grounds entitling them to relief.").

III. THE COMPLAINT ALLEGES OPINIONS AND CONCLUSIONS THAT ARE NOT SUPPORTED BY CLEAR AND CONCISE ALLEGATIONS OF FACT

In this case, there are no well-plead, ultimate facts supporting Counts III and IV. Instead, in attempt to allege agency and joint venture Plaintiff simply makes vague, convoluted and conclusory allegations which are nothing more than legal conclusions with no reference to any facts whatsoever. (*see* Complaint at paragraphs 17 through 36) For example, Plaintiff includes a tangled diagram of arrows and boxes (*see* Complaint at paragraph 17) and then opines about those relationships using "and/or" phrases and sweeping conclusions in an effort to support his allegations of agency and joint venture. (*see* Complaint at paragraphs 18 (a) – (k)). Nothing in the paragraphs 17-36 clarify or provide specific factual support for these claims. For example, Plaintiff does not include examples of specific representations allegedly made by Defendants to Plaintiff or any other third party. Plaintiff's Complaint instead simply makes vague and unsupported allegations without specifying any particular ultimate fact that would support its conclusion. Such allegations are insufficient as a matter of law.

A. Count III Fails to State a Cause of Action for Agency

Count III fails to include facts to meet the required elements of an actual agency claim against Paradigm and should be dismissed.[1] The elements of actual agency are (1) acknowledgment by the principal that the agent will act for him or her; (2) the agent's acceptance of the undertaking; and, (3) control by the principal over the actions of the agent. *Goldschmidt v. Holman*, 571 So.2d at 426 n.5. When one considers an action based on actual agency, "it is the right to control, rather than actual control, that may be determinative." *Villazon v. Prudential Health Care Plan, Inc.*, 843 So.2d 842, 853 (Fla. 2003)*; Nazworth v. Swire Fla., Inc.*, 486 So.2d 637, 638 (Fla. 1st DCA 1986).

To allege the degree of control sufficient to establish an agency relationship, a plaintiff must show that "the principal has a right to control the operative details of the agent's work." *Orlinsky v. Patraka*, 971 So. 2d 796, 800 (Fla. 3rd DCA 2007), *citing Stoll v. Noel*, 694 So.2d 701, 703 (Fla. 1997). *See also Ocana v. Ford Motor Co.*, 992 So.2d 319, 326 (Fla. 3rd DCA 2008) ("The complaint is devoid of any allegation of some of the tell-tale signs of a principal-agent relationship, such as the ability of the principal to hire, fire, or supervise dealership employees or dealer ownership.").

[1] Count III does not specifically or in any other way allege an apparent agency claim, and clearly offers no "ultimate facts" that state an apparent agency claim.

Here, Count III fails to include facts about Paradigm to meet all three elements of an actual agency claim and therefore it must be dismissed.

B. The Complaint's Joint Venture Allegations in Count IV and VIII Are Insufficient

Counts IV and VIII[2] fail to include facts to meet the required elements of a joint venture claim. To plead a joint venture, a plaintiff must allege, in addition to the standard elements of a contract, five elements: (1) a community of interest in the performance of the common purpose; (2) joint control or right of control; (3) a joint proprietary interest in the subject matter; (4) a right to share in the profits; and (5) a duty to share in any losses which may be sustained. *Jackson–Shaw Co. v. Jacksonville Aviation Auth.*, 8 So.3d 1076, 1089 (Fla. 2008). "The absence of one of the elements precludes a finding of a joint venture." *Id.*

A mere allegation that a joint venture was created is "purely a legal conclusion." *Kislak v. Kreedian*, 95 So.2d 510, 514 (Fla. 1957). Thus, "the complaint must sufficiently allege the ultimate facts which, if established by competent evidence, would support a decree granting the relief sought under law." *Id.* (dismissing joint venture claim for failure to meet all five elements).

[2] Count VIII fails to list Hickman in its title or its prayer for relief and therefore the Defendants are uncertain whether Hickman is being sued for this count. However, almost immediately in the body of the Count Plaintiff seemingly inserts Hickman in place of ASC, the defendant mentioned in the title. *See* Complaint at paragraphs 110-112. Confusingly and inconsistently, Hickman is later dropped and ASC reappears in the allegations. Such flawed and inconsistent pleading is contradictory on its face and is insufficient as a matter of law. *E.g. Peacock v. Gen. Motors Acceptance Corp.*, 432 So.2d 142, 146 (Fla. 1st DCA 1983). The Court should not allow Plaintiff to draft the Complaint in such a flawed manner. These errors deprive Defendants the basic right to know who is being sued for what and thus for this reason alone, Count VIII must be dismissed.

Here, the Complaint fails to include a sufficient factual basis to establish a claim for a joint venture as to Hickman and thus Count IV and VIII must be dismissed.

IV. THE PLAINTIFF'S SHOTGUN PLEADING AS TO COUNT I REQUIRES DISMISSAL

Count I of Plaintiff's Complaint combines numerous unrelated allegations that are replete with conclusory, vague, and immaterial facts not obviously connected to the particular cause of action. Specifically, it incorporates on a wholesale basis the convoluted, conclusory and legally insufficient allegations regarding agency and joint venture found at paragraphs 17 through 36 of the Complaint, which are described in more detail above. These allegations are not only inconsistent with Count I, more importantly, such allegations render the Complaint, and particularly Count I, an impermissible shotgun pleading that requires dismissal. *Frugoli v. Winn-Dixie Stores, Inc.*, 464 So. 2d 1292 (Fla. 1st DCA 1985); *Gerentine v. Coastal Sec. Sys.*, 529 So. 2d 1191 (Fla. 5th DCA 1988); *RHS Corp. v. City of Boynton Beach*, 736 So. 2d 1211, 1213 n.1 (Fla. 4th DCA 1999).

As the Authors' Comment—1967 to Rule 1.110 aptly states:

> The contents of a pleading should not just meet the minimum requirements for that type of pleading. They should clearly and adequately inform the judge, the opposing party and the jury (in cases where the pleadings may be read to the jury) of the position of the pleader. The arrangement should be designed to make an orderly and effective presentation. To guide the pleader along these lines the rules

require presentation in separately numbered paragraphs and in counts (1.110(f)).

Thus, “impermissibly comingling separate and distinct claims” in a single count is defective and should be dismissed. *Aspsoft, Inc. v. WebClay,* 983 So.2d 761, 768 (Fla. 5th DCA 2008) (holding that plaintiff's complaint set forth defective claims by “impermissibly comingling separate and distinct claims” in a single count); *see also, Dubus v. McArthur,* 682 So.2d 1246, 1247 (Fla. 1st DCA 1996) (stating that the “task of the trial court was made more difficult because the appellants' amended complaint improperly attempts to state in a single count separate causes of action”).

The wholesale incorporation by reference of these types of inconsistent and multifaceted pleadings into a single count, as the Plaintiff has done here in Count I, has generally been characterized in federal cases as “shotgun” pleading, which has long been held to violate Federal Rule 8 and require dismissal of the claim. *See, e.g., Weiland v. Palm Beach City Sherriff's Office,* 792 F.3d 1313, 1320 (11th Cir. 2015). Although there are different types of shotgun pleadings, the basic tenant is that each "fail[s] to one degree or another . . . to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland,* 792 F.3d at 1320. In *Weiland,* the federal court discussed and described the four types of "shotgun" pleadings which require dismissal including the type of shotgun pleading that is most applicable to Count I of this action: “[t]he next most common type [of shotgun pleading]. . . is a complaint . . . replete with conclusory,

vague, and immaterial facts not obviously connected to any particular cause of action. . . ." *Weiland* at 1321-23 (footnotes omitted).

Because Count I of Plaintiff's Complaint is an impermissible shotgun pleading that incorporates, comingles, and combines numerous, inconsistent and unrelated allegations replete with conclusory, convoluted, vague, and immaterial allegations not obviously connected to the particular cause of action, Count I should be dismissed.

V. CONCLUSION

Plaintiff attempts to impose liability on Defendants by deliberately tangling and obfuscating the relationships between the parties and failing to plead ultimate facts. This is not allowed under Florida law. Thus, based on the foregoing reasons, Defendants, GREGORY HICKMAN, M.D. and PARADIGM ANESTHESIA, P.A., respectfully request this Court to dismiss Counts I, III, IV and VIII for failure to state a cause of action.

Respectfully submitted this 18th day of March, 2018.

HENRY BUCHANAN, P.A.

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CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that the foregoing document was served via electronic mail to the following persons, this 18th day of March, 2019:

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